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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

LOUIS GUGLIELMI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Does a work which is alleged to be obscene appeal to the prurient interest in sex as this Court has defined that phrase if it has no tendency to arouse sexually but has "the capacity to attract individuals eager for a forbidden look"?

II. Is a sentence of 25 years imprisonment imposed on a 55 year old first offender for the crime of interstate shipment of obscene films which involved no children, which were not displayed to unconsenting adults, and which were shipped interstate pursuant to repeated orders placed by the FBI so disproportionate to the crime that it violates the Eighth Amendment's ban on cruel and unusual punishment?

III. Did Congress intend and, if so, does the Constitution permit, imposition of consecutive sentences based on several

interstate shipments of obscene films where the several shipments were made pursuant to multiple order for the films placed by the FBI?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. V:

> ...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ...nor be deprived of life, liberty, or property, without due process of law....

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. §1465:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> The transportation as aforesaid of two or more copies of any publication or two or more of

any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

18 U.S.C. §1462:

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce --

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful --

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both for each such offense thereafter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 819 F.2d 451, and is set forth in the appendix at A-1.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 21, 1987. (A-1) The order denying the petition for rehearing and suggestion for rehearing en banc was entered on July 1, 1987. (A-24-25) By order dated August 6, 1987, the Honorable William H. Rehnquist extended the time for filing the petition for a writ of certiorari to and including September 29, 1987. (A-26)

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner is presently serving a 25-year sentence following conviction on obscenity charges. As the proprietor of a Baltimore, Maryland business which distributed films, magazines, books and sex aids to adult bookstores, Petitioner sold and shipped merchandise, including three short films depicting acts of bestiality, to the New Freedom Adult Bookstore in Charlotte, North Carolina. After arresting the bookstore's proprietor, the FBI learned that the films had been purchased from Petitioner. Then, posing undercover as the owners of another North Carolina adult bookstore, FBI agents began placing orders with Petitioner for sexually-oriented merchandise, including bestiality films. Pursuant to those FBI orders, on three occasions Petitioner shipped bestiality films

to the FBI in North Carolina. Petitioner was later indicted in the Western District of North Carolina.

The 11-count indictment charged five paired counts of interstate transportation of obscene films (18 U.S.C. §1465) and use of a common carrier to transport those films (18 U.S.C. §1462), and one count of conspiracy to commit those crimes (18 U.S.C. §371). The conspiracy count and four of the substantive counts were based on the shipment of the three films to the New Freedom bookstore.

The remaining six counts were based on the three shipments made pursuant to the orders placed by the undercover FBI agents. A total of eight films, all depicting various acts of bestiality, were involved.

At his jury trial, Petitioner defended on the ground that the films were not obscene. His defense was that the films neither

appealed to the prurient interest of the average, adult member of the general community nor to the prurient interest of the deviant group of zoophiliacs. The prosecutor argued that the films could be obscene even if they did not appeal to the prurient interest of anyone; in the government's view it was sufficient if they were "an appeal to" or were "directed toward" the prurient interest. The trial court, throughout trial and in its instructions to the jury, adopted the government's position.

Petitioner was convicted on all counts. The sentencing judge paired the five sets of interstate shipment/common carrier counts and sentenced Guglielmi to six five-year terms, five of which were to run consecutively. In other words, he imposed a total sentence of 25 years incarceration. He also imposed a $35,000 fine.

On appeal to the Fourth Circuit, Petitioner contended that the prosecutor had failed to prove -- and the jury instructions had failed to require that the jury find -- that the films "appeal to the prurient interest" as that phrase had been defined by this Court. He also argued that the sentence imposed was so disproportionate to the crime -- especially in light of the government's role in placing repeated orders for the films and thus inducing Petitioner to make multiple shipments which served as the basis for consecutive sentences -- that it constituted cruel and unusual punishment proscribed by the Eighth Amendment.

The Court of Appeals affirmed the conviction and held that the films had properly been found obscene. That Court held that a work appeals to the prurient interest even if it does not have the capacity to

arouse sexually as long as it has "the capacity to attract individuals eager for a forbidden look."

The Court of Appeals also rejected Petitioner's Constitutional challenge to his sentence. It noted that it was concerned about the length of the sentence imposed. (A-22) However, it held that Eighth Amendment proportionality analysis applies only to sentences as or more severe than life imprisonment without possibility of parole, and that Petitioner's 25-year sentence was thus immune from Constitutional challenge. It did not hold that the sentence ws proportional to Petitioner's crimes.

The Court denied a petition for rehearing or rehearing en banc.

REASONS FOR GRANTING THE WRIT

POINT I

THE DECISION OF THE COURT OF APPEALS -- WHICH DEFINES "APPEAL TO THE PRURIENT INTEREST" AS "THE CAPACITY TO ATTRACT INDIVIDUALS EAGER FOR A FORBIDDEN LOOK" -- REPRESENTS A SERIOUS DEPARTURE FROM THIS COURT'S RULINGS WHICH CAREFULLY DEFINE THAT WHICH IS OBSCENE

The decision of the Court of Appeals, by redefining "appeal to the prurient interest," substantially expands the scope of that which is obscene and thus unprotected by the First Amendment. The sole contested substantive issue in this case was whether the eight films were obscene under the first prong of the tripartite test of Miller v. California, 413 U.S. 15 (1973). Under that test, material is not obscene unless "taken as a whole, [it] appeals to the prurient interest [in sex]." Id. at 24. Based on this Court's obscenity decisions, the defense took the position that,

to appeal to the prurient interest, material must evoke or be capable of evoking a sexual response in the average member of the community or, if directed toward a deviant group, in the average member of the deviant group. The prosecution urged that the material need not be capable of evoking a sexual response on the part of anyone and that it need not "appeal to" anyone's prurient interest. According to the prosecution all that is necessary is that the material be "an appeal to," that is, be "directed toward" a prurient interest in sex. The trial court adopted the prosecution's position. On appeal, Petitioner urged this was error.

The Court of Appeals for the Fourth Circuit rejected the defense position, but went even farther than the prosecution had urged. It held that material may be obscene even though it incites no sexual response in

anyone. The Court of Appeals held that material appeals to the prurient interest within the meaning of Miller if it has "the capacity to attract individuals eager for a forbidden look." (A-14)

In so ruling, the Fourth Circuit disregarded the relevant case law of this Court and adopted a wholly novel and unprecedented definition of appeal to the prurient interest, a definition flagrantly at odds with that adopted by this Court.

The Court of Appeals was not writing on a clean slate. This Court has defined the concept of "appeal to the prurient interest." It is material which arouses a sexual response, and does so excessively, morbidly, or shamefully. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985); Roth v.

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United States, 354 U.S. 476, 487 n.20 (1957); Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482-87 (1962).

The question of whose prurient interest in sex must be considered in determining whether a particular work is obscene has also been addressed by this Court. In Roth v. United States, supra, 354 U.S. at 490, the Court approved a jury instruction which explained:

> The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. (emphasis added)

This Court has carved out only one exception to the "average person" rule. That is the rule of Mishkin v. New York, 383 U.S. 502 (1966), a case involving depictions of various "deviant" sexual practices. The

defendant had argued that the materials did not appeal to a prurient interest of the average person in sex; instead of stimulating the erotic, they would disgust and sicken. This Court rejected the argument:

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.

Id. at 508.

The decision of the Court of Appeals rejects this whole body of case law. Instead, based solely on a Comment to Tenative Draft No. 6 of the Model Penal Code (1957), it defines appeal to the prurient interest as a reference "to qualities of the material itself: the capacity to attract individuals eager for a forbidden look." (A-14) Reliance

on this language was completely unjustified[1] and serves to distort the entire body of obscenity jurisprudence carefully developed by this Court.

The laws against obscenity exist, at least in part, in recognition of the fact that obscene materials have the capacity to do something: to arouse or excite or stimulate sexually in an unhealthy, morbid, or excessive way. A central justification for obscenity law is its perceived or assumed effect on human beings and on their behavior. Accordingly, it is reasonable to suggest that materials which are so repulsive that they do not excite, arouse, or stimulate sexually are outside the scope of obscenity regulation. Nor does that mean that the more repulsive a

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[1]Although the Roth Court did quote approvingly from Tentative Draft No. 6, it did not quote, or endorse, this language relied on by the Court of Appeals. See Roth v. United States, 354 U.S. at 487 n.20.

work is, the less likely it is to be obscene. This is because the law recognizes and takes into account the existence of deviant sexual groups whose members are sexually aroused by materials which the general, "normal" adult heterosexual population would find bizarre or repulsive -- not erotically exciting -- and the law recognizes that such materials may be obscene based on their effect -- their ability to arouse -- members of the deviant group. Thus, contrary to the Fourth Circuit's view, acceptance of this Court's decisions and the defendant's thesis based on them does not mean that "the more repulsive, the less obscene."

The test adopted by the Court of Appeals to avoid the perceived, but largely non-existent, problem is one which was never urged by the government and never before adopted by this or any other court.[2] Furthermore, if, as

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[2]If it is to become the law, principles of due
(footnote continued)

the Court of Appeals apparently believed, the Miller test is inadequate to deal with the kind of vulgar material at issue in this case, then it is important for this Court to address the problem.

The Court of Appeals for the Fourth Circuit, perhaps unwittingly, has made major changes in a very sensitive area of First Amendment jurisprudence. Because its decision redefines an essential element of obscenity, and conflicts with the definition adopted by this Court, the petition for a writ of certiorari should be granted.

(footnote continued from previous page) process and fair notice require that it be adopted prospectively, and not applied retroactively -- and without notice or opportunity to be heard -- against the Petitioner. Application of the new rule to Petitioner's case is particularly unfair because part of his defense at trial rested on his contention that these bizarre films appealed to the sense of curiosity, and not to "the prurient interest." To redefine prurient interest to mean something akin to curiosity -- eagerness for a forbidden look -- is thus grossly unfair.

POINT II

THE RULING OF THE FOURTH CIRCUIT -- THAT ONLY SENTENCES AS OR MORE SEVERE THAN LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE ARE SUBJECT TO PROPORTIONALITY REVIEW UNDER SOLEM v. HELM -- IS CONTRARY TO THE EXPRESS COMMAND OF SOLEM AND IN CONFLICT WITH THE RULINGS OF THE OTHER COURTS OF APPEAL

Noting that it was "concerned" about the sentence imposed, the Court of Appeals for the Fourth Circuit nevertheless ruled that only sentences as or more severe than life imprisonment without possibility of parole are subject to proportionality review under Solem v. Helm, 463 U.S. 277 (1983). (A-22-23) That decision is directly contrary to this Court's mandate in Solem. In that case this Court squarely held that the Eighth Amendment prohibits prison sentences that are disproportionate to the crime committed. Specifically, the Solem Court held that a life

sentence without possibility of parole imposed under a state recidivist statute for a seventh non-violent felony offended the Eighth Amendment.

The Solem Court noted that reviewing courts should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes and to the discretion that trial courts possess in sentencing convicted criminals. Accordingly, it stated that "a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." Id. at 290 n.16. But the Court also made clear that "no penalty is per se constitutional." Id. at 290 (emphasis added).

Solem neither states nor suggests that the proportionality requirement of the Eighth Amendment applies only to prison terms of life without parole. On the contrary, the decision made clear that it applies to all punishments.[3]

The Solem Court also established the analytical framework for review of sentences claimed to be disproportionate and identified three objective factors to be considered by

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[3]Nor does this Court's failure to overrule Rummell v. Estelle, 445 U.S. 263 (1980), or Hutto v. Davis, 454 U.S. 370 (1982) (per curiam), support the Fourth Circuit's ruling. The Solem Court said that Hutto v. Davis makes clear that Rummell should not be read to foreclose proportionality review of sentences of imprisonment.

> Rummel did reject a proportionality challenge to a particular sentence. But since the Rummel Court -- like the dissent today -- offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual setting.

Solem v. Helm, supra, 463 U.S. at 303 n.32.

the reviewing court. First, the gravity of the offense and the harshness of the penalty must be examined. Second, a comparison of the sentences imposed on other criminals in the same jurisdiction may be undertaken. "If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." Id. at 291. Finally the court may compare the sentences imposed for commission of the same crime in other jurisdictions. The framework is a general one, applicable on its face to all sentences which might be imposed.

Every Court of Appeals other than the Court of Appeals for the Fourth Circuit has accepted -- and applied -- the plain teaching of Solem v. Helm. While those courts have frequently upheld lengthy sentences against Eighth Amendment disproportionality

challenges, and many have done so without extended analysis, all have recognized that term-of-years sentences must be proportionate to the crimes for which they are imposed and have applied the criteria set forth in Solem for testing proportionality. See, e.g. Tuitt v. Fair, Slip. op. 86-1808 (1st Cir., June 4, 1987); United States v. Ortiz, 742 F.2d 712 (2d Cir.), cert. denied, 105 S.Ct. 573 (1984); United States v. Rosenberg, 806 F.2d 1169 (3d Cir. 1986); Whitmore v. Maggio, 742 F.2d 230 (5th Cir. 1984); Foots v. Louisiana, 793 F.2d 610 (5th Cir. 1986); Chandler v. Jones, 813 F. 773 (6th Cir. 1987); United States v.Mitchell, 788 F.2d 1232 (7th Cir. 1986); United States v. Sato, 814 F.2d 449 (7th Cir. 1987) (fine); United States v. Eggleton, 799 F.2d 378 (8th Cir. 1986); United States v. Terrovona, 785 F.2d 767 (9th Cir. 1986); United States v. Hack, 782 F.2d 862 (10th Cir. 1986); United

States v. Darby, 744 F.2d 1508 (11th Cir. 1984); cf. United States v. Holland, 810 F.2d 1215 (D.C. Cir. 1987). Only the Fourth Circuit has read Solem v. Helm to foreclose proportionality review of sentences of terms of year.

The Fourth Circuit's ruling is especially troublesome for several reasons which make this case particularly appropriate for consideration by this Court.

First, if the sentence imposed here is subjected to proportionality review under Solem v. Helm's analytical framework, its unconstitutionality seems clear. Obscenity offenses involving consenting adults are widely viewed as not particularly serious.[4]

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[4]The study of the population's view of the comparative seriousness of 140 different crimes cited by this Court in Solem ranked an obscenity offense (sale of pornographic magazines) as less serious than 127 of the other crimes studied, including driving while a license is suspended, refusal to make

(footnote continued)

The State of North Carolina itself, the jurisdiction into which the films were shipped, classifies the crime of selling obscene matter as an offense against public morality and decency. This is a "Class J" felony, the least serious felony recognized under North Carolina law, punishable by a

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(footnote continued from previous page) essential repairs to rental property, passing worthless checks of less than $100, and soliciting for prostitution. See Rossi, Waite, Bose & Berke, The Seriousness of Crimes: Normative Structure and Individual Differences, 39 Am. Soc. Rev. 224, 228-29 (1974). Other measures of gravity also demonstrate the relative lack of seriousness of obscenity crimes. The obscenity offenses of which Petitioner stands convicted were non-violent and victimless. No minors were involved, and no participant was coerced or subjected to duress of any kind or even involuntarily exposed to any offensive matter. Even the Parole Release Guidelines of the United States Department of Justice assign violation of federal obscenity statutes an offense severity rating of "Category 3," on a scale where Category 8 is the most serious, and Category 1 is the least. 28 C.F.R. §2.20 (1985).

maximum term of imprisonment of three years. See N.C. Gen. Stat. §14-190.1 (1985 Cum. Supp.).[5]

The sentence Petitioner is serving -- a term of a quarter of a century -- is undeniably severe.[6] Counsel believe that it

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[5]Although the states deal with obscenity offenses in a variety of ways, most jurisdictions treat obscenity crimes as relatively minor.

[6]To be sure, under current Parole Release Guidelines, Petitioner would be eligible for parole after completing one-third of his 25 year term, that is, after eight and one-third years. But the fact that every federal offender, even those sentenced to life, is eligible for parole consideration after 10 years or less suggests just how severe his sentence is. See 18 U.S.C. §4205.

The sentencing judge insured that Petitioner would not be released on parole before serving eight and one-third years by refusing his request that he be sentenced pursuant to 18 U.S.C. §4205(b)(1), which would have made him eligible for release earlier.

According to the Parole Release Guidelines, an adult offender incarcerated for a Category 3 offense would be expected to serve somewhere between ten months and 32 months prior to release. An offender like

(footnote continued)

is far harsher than any sentence ever imposed for violation of state or federal obscenity laws. Moreover, it is seriously out of line with sentences actually imposed for other offenses of much greater seriousness. Indeed, the 300 month sentence imposed on Petitioner is far longer than the average sentence imposed by federal judges on persons convicted of kidnapping, murder and rape.[7]

(footnote continued from previous page) Petitioner whose parole prognosis characteristics are "very good" would be expected to serve between ten and 14 months. See 28 C.F.R. §2.20 (1985). The sentence imposed on Guglielmi insures that he will not be considered for release before serving 100 months.

[7]See Sourcebook of Criminal Justice Statistics 1984, U.S. Department of Justice, Bureau of Labor Statistics at 576, Table 5.16, which shows the following average sentences, in months, for selected offenses.

First degree murder	182.9 months
Burglary	103.8
Embezzlement	32.8
Income Tax Fraud	26.3
Counterfeiting	37.8
Rape	115.0

(footnote continued)

Second, the government's role in causing a series of offenses on which consecutive sentences were imposed makes the sentence particularly problematic and open to question under the Constitution. See infra, Point III.

Finally, if the sentence imposed here is beyond judicial review under the Eighth Amendment, then there will necessarily be a chilling effect on conduct protected by the First Amendment. Few persons will run the risk of a 25 year sentence -- or one of 35 or 45 or 55 years -- for dealing in sexually explicit non-obscene material which may be found by some jury, somewhere, to be legally obscene.

(footnote continued from previous page)

Bribery	33.2
Gambling and lottery	24.8
Perjury	40.6
Kidnapping	236.2

Accordingly, this case is appropriate for certiorari on several grounds. The judgment of the Court of Appeals is in apparent conflict with a recent ruling of this Court. If left to stand, there will be a conflict among the Circuits on an important Constitutional question which affects the rights of virtually every defendant sentenced for a crime. If the Court of Appeals is wrong, Petitioner is entitled to a judicial determination, under the rule of Solem v. Helm, as to whether his sentence is proportional to his crimes. If it is not, he is serving a sentence which the Constitution forbids. Finally, if left standing, the judgment will chill the exercise of protected First Amendment rights.

No judge has suggested, and no court has held, that Petitioner's sentence is properly proportional to his crimes. Accordingly, the

writ of certiorari should be granted and, at the very least, the case should be remanded to the Court of Appeals with directions that it determine whether the Petitioner's sentence is proportional to his crimes.

POINT III

CONGRESS DID NOT INTEND AND, EVEN IF IT DID, THE CONSTITUTION DOES NOT PERMIT, IMPOSITION OF CONSECUTIVE SENTENCES BASED ON SEVERAL INTERSTATE SHIPMENTS OF OBSCENE FILMS WHERE THE SEVERAL SHIPMENTS WERE MADE PURSUANT TO REPEATED ORDERS FOR THE FILMS PLACED BY THE FBI

Incarceration for fifteen years of the 25 year sentence in this case was imposed as punishment for three interstate shipments of films made pursuant to three different orders for the films placed in a six-week period by the FBI. Petitioner contends that, in enacting the obscenity laws, Congress did not intend to allow cumulative punishments for a single course of conduct like that here which is split into, and charged as, separate crimes only as a result of the conduct of the FBI. Moreover, Petitioner maintains that, even if

Congress did intend such a result, the Constitution's Fifth and Eighth Amendments would not permit it.

As this Court has repeatedly noted, the first step in assessing the permissibility of cumulative punishments for related crimes is determining whether Congress has authorized such punishments. See, e.g., Albernaz v. United States, 450 U.S. 333 (1981); Whalen v. United States, 445 U.S. 684 (1980); Bell v. United States, 349 U.S. 81 (1955).[8]

Petitioner contends that Congress did not intend to permit the pyramiding of penalties that was done here. Unlike the lengthy sentences authorized, for example, under the continuing criminal enterprise statute, this

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[8]While initially a matter of statutory construction, even this question is of Constitutional magnitude for the Double Jeopardy Clause prevents a sentencing court from prescribing greater punishment than the legislature intended. See Missouri v. Hunter, 429 U.S. 359, 366 (1983).

is not a case in which Congress specifically authorized lengthy prison terms to deter very serious, but very lucrative, criminal conduct. In addition, there is surely no reason to believe that Congress contemplated or intended to permit federal agents to place repeated orders for materials they believed to be obscene and, by so doing, to increase the defendant's exposure at will, and without limit, without the possibility of judicial review. But that is precisely the import of the Fourth Circuit's ruling in this case. Although the question was raised in that court, it did not address the question whether Congress ever intended to permit the imposition of lengthy, consecutive sentences for Petitioner's course of conduct.

In any event, even if Congress intended to allow the imposition of multiple consecutive sentences for what is essentially

a single crime violating a single societal norm, Petitioner maintains that the Eighth and Fifth Amendments to the Constitution would not permit it. See O'Neil v. Vermont, 144 U.S. 323, 337 (1892) (Field, Harlan, and Brewer, JJ., dissenting; consecutive sentences totalling more than 54 years for 307 counts of unlawfully selling intoxicating liquor violate Eighth Amendment; majority did not reach the issue on ground that it was not presented for review). See also Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties, 67 Yale L.J. 916 (1958).

Where the sentences are imposed for crimes committed as a result of governmental overreaching in the placing of repeated orders, and based on the prosecutor's charging of those crimes as multiple offenses, they may also violate the due process requirement of

fundamental fairness. Cf. Hampton v. United States, 425 U.S. 484, 491 (Powell, J., concurring); id. at 495 (Brennan, J., dissenting) (1976); United States v. Russell, 411 U.S. 423 (1973).

These important questions of statutory construction and of Constitutional rights which have implicitly been answered in the negative by the Fourth Circuit's decision to let the sentence stand are also worthy of consideration by this Court.

CONCLUSION

For the reasons stated, it is respectfully requested that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: New York, New York
September 29, 1987

A P P E N D I X

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-5255

United States of America,
Appellee,

-versus-

Louis Guglielmi,
Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, District Judge. (C-CR-85-59)

Argued: July 16, 1986 Decided: May 21, 1987

Before ERVIN and WILKINSON, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Alan M. Dershowitz (Victoria B. Eiger; Nathan Z. Dershowitz; Dershowitz & Eiger, P.C.; Harold J. Bender; Louis Sirkin; Sheldon H. Braiterman; Braiterman & Johnson, P.A. on

brief) for Appellant; Debra J. Stuart, Assistant U.S. Attorney (Charles R. Brewer, United States Attorney on brief) for Appellee.

HAYNSWORTH, Senior Circuit Judge:

Guglielmi was convicted upon multiple counts of an indictment charging interstate transportation of obscene films and use of a common carrier for interstate transportation of the same films. His first, and perhaps principal, argument is essentially that the materials are so disgusting and repellent that they could not be found to appeal to the prurient interest of the average person, nor to the average zoophiliac. The latter branch of his contention is premised upon his subordinate contention that there is no such thing as an average zoophiliac. The argument is not without ingenuity, but we reject the

notion that greatly offensive material has the protection of the First Amendment while less offensive material does not.

I.

Guglielmi was the operator of a warehouse in Baltimore, Maryland from which he supplied adult bookstores with films, written materials, pictures and sexual aids and devices. The operator of such a bookstore from Charlotte, North Carolina was arrested, and the FBI became interested in some films found there which included scenes of bestiality. The operator of the bookstore said that he had purchased those films from Guglielmi.

Thereafter, an FBI agent, operating undercover, ordered more of such films from Guglielmi and received them in Charlotte upon the conclusion of shipments from Baltimore.

Guglielmi was indicted in the Western District of North Carolina. The first count charged him with conspiring with the owner of the Charlotte bookstore and the owner's son to ship obscene materials in interstate commerce. The next ten counts were in five pairs. The first of the pairs charged aiding and abetting interstate transportation of a named film or films in violation of 18 U.S.C.A. §1465 (1984); the second of the pair charged him with the use of a common carrier for the interstate transportation of the same film or films in violation of 18 U.S.C.A. §1462 (1984).

A jury convicted him on all counts. After pairing the counts for sentencing, the district court imposed a five year sentence on the conspiracy count and five years on each of the paired transportation counts. Only the first two were to run concurrently while the

remainder were to run consecutively, to make a total sentence of twenty-five years. It also imposed fines totaling $35,000.

II.

The parties have presented this case as if all of the portrayals in the eight named films are bestial. Actually that is not the case. We are informed that in six of the eight films there are portrayals of a variety of sex acts among humans. In one of them, entitled "Snake Fuckers," for example, use of what appears to be a live eel is only one of many incidents. As the film opens, a young woman is shown handling what appears to be a large live eel that she drops on the floor. An older woman appears and the two remove each other's clothing and perform cunnilingus. The younger woman then inserts the eel into the vagina of the older woman. She moves it back and forth. There is a film break, and the eel

is then shown inserted in the woman's anus while another object has been inserted in the woman's vagina. The two objects are moved back and forth in their separate orifices.

There is a film break and the two women, now clothed, and a man are shown seated at a kitchen table while frying on the kitchen stove are what appears to be cut up pieces of eel. The man suddenly rises and displays his erect penis. The older woman performs fellatio upon him while the man and younger woman disrobe and touch busy tongues together. The man and the older woman are then shown engaged in vaginal intercourse. The man withdraws in time to spray his ejaculate partly into the open mouth of the woman and partly upon her face and breasts. The woman then licks the head of the penis clean.

Two of the films are exclusively bestial.

In "Horny Boar," a young woman in a short dress teases a boar. The boar persistenly seeks to raise the back of her skirt with his snout, though the skirt falls back each time. Finally, the woman removes her dress and panties and assumes a submissive crouching position on the straw covered floor. A second woman throws a rough cloth on the shoulders and upper back of the crouching woman to provide some protection from the boar's pawing hooves. The boar mounts her and she reaches back with her right hand to guide his penis into her vagina. When the boar is finished, the woman climbs over a pile of baled hay and leaves the scene as the boar looks eagerly after her. Later the woman returns. This time with little ado she takes the submissive crouching position. The boar mounts her, and again she reaches back with her right hand to

guide his penis. When done, the boar falls off to one side in apparent exhaustion or relaxation.

The other film, "Horsepower," displays two naked woman massaging a small pony's penis with their hands and mouths. One woman then positions herself beneath and beside the pony and directs the pony's penis to her genitals. There is little doubt that some touching occurs, but because of the awkwardness of the position, there is some doubt about vaginal penetration. A large dog then appears. The woman fondle and manipulate his penis. They then have vaginal intercourse with the dog in two different positions.

This is enough, perhaps, to demonstrate Guglielmi's proposition that the films are absoultely disgusting, but it should also demonstrate that there is support for the testimony of the government's expert witness

that each of the films would have an appeal to the prurient interest of an otherwise sexually normal person. Some men will find sexual degradation of a woman titillating, while the prurient interest of some males may be aroused by explicit portrayals of a woman's genitals during lesbian activity.

There is a reference in the record by the defendant's "sexologist" to a film showing the insertion of comparatively large objects, a fist and a beer can, into a woman's vagina, though she thought that the film had scientific value in its demonstration of the elasticity of the vagina.

The government's expert also expressed the opinion that the films would appeal to the prurient interest of a deviant sexual group known as zoophiliacs, people who fantasize about sex acts with animals.

III.

At the trial, there was much bickering between the prosecutor and defense counsel about the prurient interest branch of the Miller v. California, 413 U.S. 15 (1973), test. It was the position of the defense that the prurient interest branch could be satisfied only if the material appealed to the prurient interest of the average person in the sense that the average person viewing the material would experience sexual arousal. The prosecutor thought it enough that the material was "directed to sexual arousal," and the district court formulated the question as being whether the material was an appeal to prurient interest. This, Guglielmi contends, was reversible error since it permitted the jury to find the films obscene without finding that the average person would experience sexual arousal upon seeing them.

One of the defendant's expert witnesses testified that zoophiliacs are not fungible. Their fantasies are animal specific. One whose fantasies are about sexual activity with one animal would not be sexually aroused by portrayals of sexual activity involving any other animal. On the basis of that testimony, Guglielmi contends that there is no such thing as an average zoophiliac, and that the sub-groups are so small no finding of obscenity can be based upon a finding of prurient appeal to zoophiliacs.

IV.

The test prescribed by Miller v. California is "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct...;

and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller, 413 U.S. at 24 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)). The focus here is upon the first branch of the three part test, for there is no doubt that the films here are patently offensive and have no redeeming social value. It bears reminder, however, that material is not obscene unless it is patently offensive.

The average person comes into the test not as the object of the appeal but as its judge. It is he, not the most prudish, who applying contemporary community standards, determines whether or not the work appeals to the prurient interest. There is no explicit requirement that the average person determine that the material appeals to the prurient

interest of the average person. If that there the case, the average juror would answer the question by assessing his own reaction.

Doubtless there is an objective component in the test. In Regina v. Hicklin, [1868] L.R. 3 Q.B. 316, obscenity was judged by its effect upon the most susceptible persons. That approach was rejected in Roth v. United States, 354 U.S. 476, 488-89 (1957). Obscenity may not be so lightly found. The effect upon less susceptible persons must be put in the balance. As the offensiveness requirement in the Miller test is more than minimally met, however, the greater the number of people who would react to the material with revulsion and disgust. Surely Guglielmi is right that the reaction of most people of these films would be one of rejection and disgust, not one of sexual arousal, but that cannot lead to the conclusion that the most

offensive material has constitutional protection while less offensive material does not. In other contexts, one may find many references to the prurient interest of the average person, such as in Roth's rejection of the Hicklin test, id. at 489-90, but such references do not convert into a rule that if the material is so offensive as to be more disgusting to the average person than appealing to his prurient interest, it may not be found to be obscene. See Mishkin v. New York, 383 U.S. 502, 508-09 (1966).

Tentative Draft No. 6 of the Model Penal Code, quoted in Roth, had it right. In rejecting the tendency to corrupt or debase or arouse lust tests, it defines appeal to the prurient interest as a reference "to qualities of the material itself: the capacity to attract individuals eager for a forbidden look." Model Penal Code §207.10(2) comments,

at 10 (Tent. Draft No. 6, 1957). Those individuals need not all be average persons. See Pinkus v. United States, 436 U.S. 293, 301-02 (1978); Hamling v. United States, 418 U.S. 87, 128-30 (1974).

Material that provokes "only normal, healthy sexual desires" is not obscene. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985). It is obscene only if it appeals to or provokes a prurient interest. Such an interest was referred to in Roth as a "shameful or morbid interest in nudity, sex or excretion." Roth, 354 U.S. 487 n.20 (quoting Model Penal Code §207.10(2) (Tent. Draft No. 1957)). Many persons, perhaps most persons, having a normal, healthy interest in sex would have no shameful or morbid interest in nudity, sex or excretion. To meet the definition of obscenity, material must appeal to such a shameful or morbid interest and also be

patently offensive. The average person would view such materials with an intellectual curiosity, the defendant's expert witnesses agree, but not experience a whetting of sexual appetite. So much may be conceded, but if it appeals to those "individuals eager for a forbidden look," it meets the prurient interest requirement of the Miller test.

For these reasons, we reject the defendant's contention that material may not be found to be obscene unless it excites the sexual drive of the average person. The more offensive the material, the greater will be the number who would react to it with revulsion, but, as one commentator has observed, "[N]either the Supreme Court nor the legislature intended that tasteful pornography be suppressed while distasteful pornography remains unregulated." F. Schauer, The Law of Obscenity, 102 (1976).

To the extent that United States v. Treatman, 524 F.2d 320 (8th Cir. 1975), may be read as supporting the defendant's contention, we are unpersuaded by it. We simply cannot acccept the proposition that the First Amendment lends no protection to offensive material but envelops the most offensive within its protective wings.

For the same reasons, the district court was not required to ask the jury to find whether there was such a thing as an average zoophiliac and the appeal of the films to such a person. See Pinkus, 436 U.S. at 302; Hamling, 418 U.S. at 128-29. The jurors viewed the films, and, with such help as the expert witnesses provided, were competent to make the proper determination.

V.

Before trial, the defendant made a motion for recusal of the judge under 28 U.S.C.A. §455(a) (West Supp. 1987), and now appeals from the denial of that motion.

The motion was based upon remarks made by the judge while imposing a sentence upon a pornographer in an earlier case. The films in that case were particularly vile and repulsive. In imposing sentence, the judge made it clear that he regarded the distribution of such material as a serious offense against society. The judge had been exposed to those films in his judicial capacity, however, and it is entirely appropriate for a judge, when imposing a sentence, to comment upon the nature and gravity of the offense. See United States v. Carmichael, 726 F.2d 158, 160 (4th Cir. 1984).

This case is wholly unlike Berger v. United States, 255 U.S. 22 (1921). In that case in the World War I era the defendant, who was of German descent, was charged with violations of the Espionage Act. In an earlier case the judge, Kennesaw Mountain Landis, had expressed himself as greatly doubting the loyalty of every German-American. The Supreme Court held, of course, that he should have recused himself in the Berger case. The earlier public expression warranted a reasonable belief that the judge was prejudiced against any German-American who might be brought before him upon charges of violations of the Espionage Act. Here, there is nothing to indicate a predisposition on the part of the judge to believe that Guglielmi was guilty of the offenses with which he was charged. A general expression by a judge when sentencing a defendant to a term in prison

that the crime of which he stands convicted was a serious one does not disqualify the judge from presiding in later cases involving defendants charged with similar offenses.

VI.

A few days before the trial was to commence, the district judge signed an order that the voir dire of the jurors would be conducted by the judge and the parties would have the right to propose questions to be asked of the jurors. Though the usual practice of most of the district courts in this circuit is to have the judge conduct the voir dire, the usual practice in the Western District of North Carolina is to have the voir dire conducted by the lawyers. The order in this case was said to have been justified by an interest in efficiency to enable the court to reach and dispose of another case.

We see no abuse of discretion by the district court. The defendant has no vested interest in the use of any particular procedure in voir dire. United States v. Brunty, 701 F.2d 1375, 1378 (11th Cir.), cert. denied, 464 U.S. 848 (1983).

The defense proposed a large number of questions, and the district judge used most, but not all, of them. He did not inquire of the jurors about their personal attitudes toward specific sexual practices.

We find nothing inherently unfair in the voir dire. The jurors were asked a great many questions designed to disclose their associations and general attitudes. The declination by the district judge to ask the jurors about their personal reactions to specified sex acts was well within the court's

discretion. See Hamling, 418 U.S. at 138-40; see also United States v. Martin, 773 F.2d 579, 584 (4th Cir. 1985).

VII.

Finally, the defendant complains about the twenty-five year sentence imposed upon him. He seeks to have this court conduct a proportionality analysis of it and find that it is so disproportionate as to amount to cruel and unusual punishment in violation of the Eighth Amendment.

This panel is concerned about the sentence. The sentence is within the statutory limits, but the judge ordered that the sentences on the five paired counts run consecutively. Those counts were based upon separate shipments of the offensive films, and some of those shipments were instigated by the

FBI. An even greater number of offenses might have been charged had the FBI not discontinued its ordering of new films when it did.

Guglielmi had been in the business for a number of years, but he had never been convicted of any offense.

A panel of this court has recently held, however, that Solem v. Helm, 463 U.S. 277 (1983), does not require a proportionality review of any sentence less than life imprisonment without possibility of parole. United States v. Rhodes, 779 F.2d 1019 (4th Cir. 1985), cert. denied, 106 S.Ct. 2916 (1986). This panel has no authority to overturn Rhodes or to depart from its holding. Only the en banc court may do that.

VIII.

Finding no error, the conviction is affirmed, and we decline to review the sentence.

AFFIRMED.

FILED Jul 1 1987
US COURT OF APPEALS
Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-5255

United States of America,

Appellee,

-versus-

Louis Guglielmi,

Appellant.

O R D E R

Upon consideration of the petition for rehearing, there having been no request for a poll of the court on the suggestion of rehearing en banc, and with the concurrence of Judge Ervin and Judge Wilkinson,

IT IS ORDERED that the petition for rehearing be, and it is hereby is, denied.

/s/ Clement F. Haynsworth, Jr.
Clement F. Haynsworth, Jr.
United States Circuit Judge

July 1, 1987

SUPREME COURT OF THE UNITED STATES

No. A-103

LOUIS GUGLIELMI,

Applicant,

v.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 29, 1987.

/s/ William H. Rehnquist
Chief Justice of the
United States

Dated this 6th
day of August, 1987.

Supreme Court, U.S.
FILED
DEC 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-532

In the Supreme Court of the United States

OCTOBER TERM, 1987

LOUIS GUGLIELMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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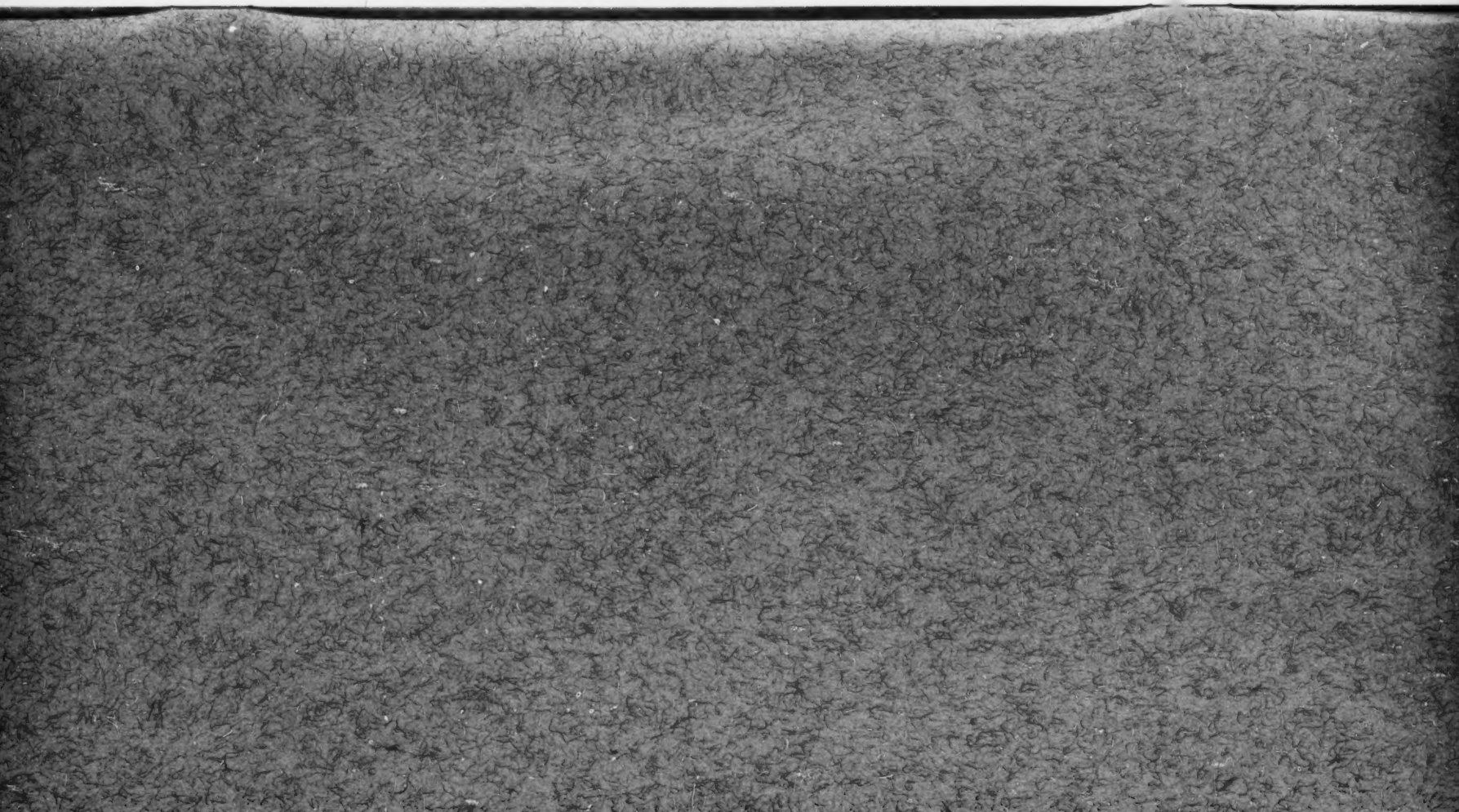

QUESTIONS PRESENTED

1. Whether the court of appeals held that sexually explicit films may be found to be obscene if they have the capacity to evoke curiosity among prospective viewers.

2. Whether petitioner's five consecutive five-year sentences violate the Eighth Amendment because they are disproportionate to the offenses of which he was convicted.

3. Whether petitioner was improperly sentenced to consecutive prison terms for acts that were part of a continuing course of criminal conduct.

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BEST AVAI

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-532

LOUIS GUGLIELMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A24) is reported at 819 F.2d 451.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1987. A petition for rehearing was denied on July 1, 1987 (Pet. App. A25). On August 6, 1987, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 29, 1987, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted on five counts of interstate transportation of ob-

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scene films, in violation of 18 U.S.C. 1465; five counts of using a common carrier for the interstate transportation of obscene films, in violation of 18 U.S.C. 1462; and conspiracy to ship obscene materials, in violation of 18 U.S.C. 371. The transportation counts were paired with the shipment counts for sentencing, and consecutive five-year terms were imposed on each set of paired counts. In addition, a concurrent five-year term was imposed on the conspiracy count for a total sentence of 25 years' imprisonment. Petitioner was also sentenced to pay fines totaling $35,000 (Pet. App. A4-A5). The court of appeals affirmed.

1. As summarized in the opinion of the court below (Pet. App. A3-A9), the government's evidence at trial showed that, beginning in July 1983, the FBI began to investigate the interstate shipment of obscene materials to the New Freedom Bookstore in Charlotte, North Carolina. After purchasing some films from the store, an FBI agent arrested the proprietor, who informed him that he had obtained the materials from petitioner, who operated a wholesale outlet in Baltimore, Maryland, known as Central Sales, Inc.

The agent then enlisted the former proprietor of another "adult" book store in the Charlotte area to order similar films from petitioner. Petitioner selected several specific titles and made three shipments of films from Baltimore to Charlotte by common carrier in July, August, and September 1984 (C.A. App. 734-738, 779). Also in September 1984, an undercover FBI agent visited the large warehouse in Baltimore operated by Central Sales, and petitioner showed him the room where he kept "animal films." Petitioner advised the agent to "[b]e careful in selling" those films, because "you can get yourself in a lot of trouble with these" (*id.* at 786-788).

The eight films seized from the New Freedom Bookstore or received through interstate shipments from petitioner

depict, among other things, acts of bestiality. Three of the films are described in detail in the opinion of the court below (Pet. App. A5-A9). One, entitled "Snake Fuckers," shows two women engaging in sex acts involving a live eel, which is later fried on a kitchen stove while men and women are depicted performing heterosexual and homosexual sex acts (*id.* at A5-A6). Other films, including the other two described by the court of appeals (*id.* at A7-A8), depict sex acts involving human males and females and a cow, a boar, horses, dogs, chickens, donkeys and a pig (GXs 1-9; see Gov't C.A. Br. 14-17).

2. At trial, petitioner maintained that the "prurient interest" branch of the three-part test of *Miller* v. *California*, 413 U.S. 15, 24 (1973), could be satisfied only if the material appealed to the prurient interests of either the average person or the average zoophiliac. He further argued that the material would not appeal to the average person and that, because there is no such thing as an "average" zoophiliac, he could not be convicted. The trial judge, however, instructed the jury, using a pattern jury instruction,[1] as follows (C.A. App. 1217):

> The first test to be applied, therefore, in determining whether given material is obscene is whether the predominant theme or purpose of the material, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole, or the prurient interest of members of a deviant sexual group, as the case might be.

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[1] See, *e.g.*, U.S. Fifth Circuit District Judges Ass'n, *Pattern Jury Instructions* 110 (1983 ed.); U.S. Eleventh Circuit District Judges Ass'n, *Pattern Jury Instructions* 143 (1985 ed.).

The jury returned guilty verdicts on the conspiracy count, on all five counts of interstate transportation of obscene films, and on all five counts of the use of a common carrier to ship them. The transportation and use counts were paired with respect to five different shipments. Petitioner had shipped three of the films, which formed the basis for two pairs of counts in the indictment, to the New Freedom Bookstore. He sent the remaining films to the FBI as the result of its undercover operation. The trial judge imposed consecutive five-year terms on each of the five sets of paired counts and a concurrent five-year term on the conspiracy count.

3. On appeal, petitioner claimed that the evidence was insufficient to establish that the films appealed to the prurient interest and that the trial court's instruction concerning prurient interest was incorrect, because the court failed to instruct that the material in question must appeal to the average adult or the average member of a deviant sexual group. Petitioner also claimed that the 25-year aggregate sentence he received constituted cruel and unusual punishment because it was disproportionate to the offenses of which he was convicted.

The court of appeals rejected those claims.[2] After reviewing the contents of the films on which the prosecution was predicated, the court concluded that "there is support for the testimony of the government's expert witness that each of the films would have an appeal to the prurient interest of an otherwise sexually normal person" (Pet. App. A8-A9). In addition, the court noted that the government's expert witness had expressed the opinion that the films would appeal to the prurient interest of zoophiliacs (*id.* at A9).

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[2] The court of appeals also rejected claims that the trial judge abused his discretion in conducting the voir dire examination himself and in failing to ask particular questions, and that he should have recused himself because of personal bias (Pet. App. A18-A22).

The court of appeals noted that erotic material is not obscene unless it "appeals to or provokes a prurient interest" (Pet. App. A15). That is, the material "must appeal to * * * a shameful or morbid interest and also be patently offensive" (*id.* at A15-A16). The fact that the material provokes only curiosity among normal persons is not enough to render it nonobscene, the court noted, if the material appeals to the prurient interest of members of a deviant sexual group (*id.* at A14-A16). Thus, the court held that it was unnecessary for the material to "excite[ ] the sexual drive of the average person" in order for it to be found obscene (*id.* at A16). In this case, the court observed, "[t]he jurors viewed the films, and, with such help as the expert witnesses provided, were competent to make the proper determination" (*id.* at A17).

The court expressed concern about the length of the sentence but held that the sentence was permissible because it was well within statutory limits. The court also read its own prior decision in *United States* v. *Rhodes*, 779 F.2d 1019 (4th Cir. 1985), cert. denied, 476 U.S. 1182 (1986), to hold that the Eighth Amendment does not require proportionality review of any sentence of less than life imprisonment without parole. Pet. App. A22-A23.

ARGUMENT

1. The First Amendment protects some materials that deal with sex. "[M]aterials that provoke[ ] only normal sexual reactions" and "material that, taken as a whole, does no more than arouse, 'good, old fashioned, healthy' interest in sex" are protected. *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985). It is to distinguish such materials from obscenity that this Court has included a "prurient interest" component in the definition of obscenity. See *Roth* v. *United States*, 354 U.S. 476, 487 & n.20 (1957).

Petitioner does not and cannot maintain that the materials at issue in this case—films showing both bestiality and various sexual acts performed by human beings—would appeal to a normal and healthy rather than a prurient interest in sex. Rather, he maintains that they would appeal to no one (except, perhaps, certain zoophiliacs) and that "materials which are so repulsive that they do not excite, arouse, or stimulate sexually are outside the scope of obscenity regulation" (Pet. 11). Petitioner further contends (Pet. 7-8, 10-11, 12-13 n.2) that the court of appeals improperly extended the reach of the obscenity laws to encompass materials that do not have the capacity to arouse viewers sexually, but merely have the capacity to evoke the curiosity of viewers. He bases that characterization of the court of appeals' opinion on a reference in the opinion to a comment in the 1957 draft of the Model Penal Code, in which the reporter observed that the concept of an appeal to the prurient interest refers "to qualities of the material itself: the capacity to attract individuals eager for a forbidden look" (Model Penal Code § 207.10(2), comment at 10 (Tent. Draft No. 6, 1957), quoted at Pet. App. A14-A15).

Contrary to petitioner's contention, the court of appeals did not hold that materials may be obscene even if they have no capacity to provoke a sexual response in anyone. To the contrary, the court made it clear that, in order to be judged obscene, the materials in question must appeal to a shameful or morbid interest in sex in the average person, or in members of a deviant sexual group (Pet. App. A15-A16). The reference to the 1957 draft of the Model Penal Code did not lead the court, as petitioner suggests (Pet. 10-11), to "reject[ ]" or "distort" tests for obscenity that this Court has developed; rather, the reference was designed simply to explain the underlying rationale of the prurient interest test that this Court has applied ever since *Roth*. In particular, the court of appeals did not suggest

that jury instructions should be phrased in terms of "forbidden look[s]." Instead, the court explained why the standard jury instruction that was given in this case, which was phrased in terms of "an appeal to the prurient interest," was proper and why the evidence in this case was sufficient to convict. The court further explained (Pet. App. A15) that material is obscene "only if it appeals to or provokes a prurient interest," *i.e.*, "whetting of sexual appetite" (*id.* at A16). The court's discussion thus made it clear that an appeal to mere curiosity would not be sufficient.

The district court also did not mislead the jury in its instructions on the "prurient interest" requirement. The district court's instruction on prurient interest (see page 3, *supra*) was almost identical to the instruction that this Court approved in *Pinkus* v. *United States*, 436 U.S. 293, 301-302 (1978). After explaining that the material had to appeal to either the prurient interest of the average person in the community or the prurient interest of members of a deviant sexual group (C.A. App. 1217), the court described a prurient interest as "a morbid, degrading and unhealthy interest in sex," and explained that "[t]he test is whether the group to whom the film is directed would have a prurient interest in it" (C.A. App. 1219). Those instructions informed the jurors that, in order for petitioner to be convicted, the films had to be of a sort that, in the jury's judgment, would appeal to the unwholesome interest in sex of either the average member of the community or members of an identified deviant sex group. The instructions are entirely consistent with this Court's teachings on the issue of prurient appeal, both with regard to materials likely to appeal to the average person in the community and with regard to materials directed at members of deviant sexual groups.

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In *Mishkin* v. *New York*, 383 U.S. 502, 509 (1966), this Court rejected the claim "that the books depicting sexually deviant practices are devoid of prurient appeal" simply because they would not have appealed to the average member of the community. The Court held that where the material "is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group" (*id.* at 508). In *Hamling* v. *United States*, 418 U.S. 87 (1974), the Court addressed the question of how the prurient interest test applies to cases in which the materials could appeal to either the average person or a member of a deviant sexual group. On that issue, the Court held in *Hamling* that the jury could find that the materials satisfied the prurient interest test if some of them appealed to the prurient interest of deviant groups and other portions appealed to the prurient interest of the average person (*id.* at 128).

That was precisely the case here. Six of the eight films at issue in this case contained depictions of human beings engaged in sexual activities with one another as well as with animals (GXs 1-6, 9). The other two films featured sexual activity between humans and animals—principally intercourse between women and farm animals (GXs 7, 8). The government's expert testified at trial that some of the material in the films would appeal to the prurient interest of the average person and other portions of the materials would appeal to the prurient interest of zoophiliacs (C.A. App. 891-893). That evidence gave the jury a sufficient basis on which to find that the films were obscene.

Petitioner argued in the court of appeals that the district court erred by failing to instruct the jury that in order to be obscene, the films had to appeal to the "average"

zoophiliac. In both the district court and the court of appeals, however, petitioner made the entirely inconsistent argument that there was no such thing as an "average" zoophiliac, but that zoophiliacs are all "animal-specific" in their tastes. See Pet. App. A2, A11. Rather than requiring the jury to engage in a pointless inquiry as to whether there is an "average" zoophiliac or only discrete subgroups of zoophiliacs, each with their own "animal-specific" fetishes, the district court properly resolved the problem by requiring the jurors to find that the materials appealed to the average adult member of the adult community as a whole or to members of some deviant sexual group; the court left it to the jury to determine whether the materials in this case would have prurient appeal either to zoophiliacs as a whole or to specific subgroups among the general group of zoophiliacs. In either event, the materials would satisfy the "prurient interest" test; it is no defense that the deviant group or subgroup at which the materials are directed is small.

2. Petitioner also claims (Pet. 14-25) that he received a sentence so severe that it violates the Eighth Amendment as construed in *Solem* v. *Helm*, 463 U.S. 277 (1983). The decision in *Helm*, however, does not require that petitioner's sentence be overturned, and the judgment of the court of appeals rejecting petitioner's Eighth Amendment argument is correct and does not conflict with the decision of any court of appeals.

In *Helm*, the Court held that the Eighth Amendment requires that a "criminal sentence must be proportionate to the crime for which the defendant has been convicted" (463 U.S. at 290). The Court listed three factors that reviewing courts should use for guidance when considering the proportionality of a sentence: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the same crime in other

jurisdictions (*id.* at 292). Applying this analytical framework to the case before it, which involved a sentence of life imprisonment without possibility of parole under a state recidivist statute for uttering a $100 worthless check, the Court concluded that the sentence was disproportionately harsh and, therefore, violated the Eighth Amendment (*id.* at 295-303).

The *Helm* Court made it clear that it would not require an extended proportionality review in cases involving less severe sentences. It explained that, as a general principle, it is not the function of an appellate court to substitute its judgment for that of a sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment, the appellate court decides only whether the sentence is within constitutional limits. Therefore, "[i]n view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." 463 U.S. at 290 n.16. Likewise, the Court was careful to distinguish—not to overrule—*Rummel* v. *Estelle*, 445 U.S. 263 (1980), which upheld a life sentence for the third of three nonviolent property crimes involving $229.11 altogether. See 463 U.S. at 288 n.13, 297, 300-303 & n.32.[3]

Relying on the express disclaimer in *Helm*, 463 U.S. at 290 n.16, and the distinction this Court drew between the facts in *Helm* and those in *Rummel*, the court of appeals in a previous decision had held that *Helm* "requires an extensive proportionality analysis only in those cases involving life sentences without parole." *United States* v.

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[3] Among other things, the *Helm* Court noted that "Rummel was eligible for a reasonably early parole" (463 U.S. at 304 n.32)—*i.e.*, 12 years (*id.* at 297, 300-301). Petitioner concedes that he is eligible for parole even earlier—*i.e.*, in eight years (Pet. 21 n.6; see 18 U.S.C. 4205(a)).

Rhodes, 779 F.2d 1019, 1027-1028 (4th Cir. 1985), cert. denied, 476 U.S. 1182 (1986).[4] The *Rhodes* approach is similar to that taken by several other courts of appeals that have concluded that "[i]n cases factually similar to *Rummel*, *Rummel* still provides the rule, and a proportionality challenge to a particular sentence may be rejected without application of the *Solem* [v. *Helm*] objective criteria test." *Chandler* v. *Jones*, 813 F.2d 773, 778-779 (6th Cir. 1987) (life sentence with parole eligibility after 30 years not violative of Eighth Amendment); see *United States* v. *Rosenberg*, 806 F.2d 1169, 1175 (3d Cir. 1986) (expressing agreement with Fourth Circuit that in cases not involving life sentence without parole, an abbreviated proportionality review is appropriate), cert. denied, No. 86-6449

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[4] The government cited this passage in its brief in the court of appeals (at 40) and proceeded to argue that the sentence imposed was sufficiently proportionate to the offenses to satisfy the Eighth Amendment. The government did not argue that *Rhodes* or any other decision allowed the sentence to be upheld without any proportionality review at all. Petitioner's reply brief in the court of appeals (at 15), however, inaccurately characterized the government's argument as being "that, under this Court's decision in *United States v. Rhodes*, * * * any prison sentence short of a life sentence without parole is automatically consistent with the Constitution and not subject to attack under the Eighth Amendment." Although any such government argument would have been a misreading of *Rhodes* (in which the court did conduct Eighth Amendment proportionality review of 50- and 75-year terms of imprisonment), petitioner did not point that fact out; indeed, his brief made no other mention of *Rhodes*. Unfortunately, the court of appeals accepted petitioner's inaccurate characterization of *Rhodes* and considered itself bound to uphold the sentence in this case without any proportionality review, extensive or otherwise (Pet. App. A23). We agree with petitioner that the court of appeals erred by failing to conduct any proportionality review. There is no need for this Court to correct that error, however, because petitioner's sentence is in fact sufficiently proportionate to his offenses to satisfy the Eighth Amendment.

(May 26, 1987); *Holley* v. *Smith*, 792 F.2d 1046, 1049 (11th Cir. 1986) (*Helm* not to be construed as holding that extensive review of all prison sentences is constitutionally required), cert. denied, No. 86-6408 (Apr. 20, 1987); *Moreno* v. *Estelle*, 717 F.2d 171, 179-180 (5th Cir. 1983) (*Rummel* and not *Helm* governs sentences involving less than life terms without parole), cert. denied, 466 U.S. 975 (1984); see also *United States* v. *Sato*, 814 F.2d 449, 453-454 (7th Cir. 1987).

No extended proportionality analysis is required in this case because petitioner's sentence easily passes constitutional muster. First, petitioner's 25-year sentence, with a possibility of parole in eight years, is less harsh than the sentences upheld in *Rummel* v. *Estelle, supra*, and *Hutto* v. *Davis*, 454 U.S. 370 (1982), even though petitioner's crimes were at least as serious as the crimes involved in those cases.[5] It is difficult to construct an argument that would recognize the constitutionality of the punishments in *Rummel* and *Davis* but strike down the punishment in this case; petitioner has never tried to construct such an argument.[6]

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[5] *Rummel* involved a life sentence, with parole eligibility in 12 years (445 U.S. at 280-281), for the crime of obtaining $120.75 by false pretenses (a crime preceded by two other property crimes that netted the defendant a total of $108.36). *Davis* involved a 40-year sentence for two counts arising out of a single nine-ounce marijuana transaction. It seems obvious that the crimes involved in this case are more serious than the ones involved in *Rummel*. As to *Davis*, reasonable persons could differ about whether a single marijuana transaction more seriously offends society than the operation of a wholesale outlet for obscene materials, but the latter plainly is not so much less serious than the former as to require different constitutional results in *Davis* and in this case. Cf. *Rummel*, 445 U.S. at 282-283 n.27.

[6] In his petition (at 16 n.3), as in his reply brief in the court of appeals (at 16), petitioner has limited his discussion of *Rummel* to the assertion that it does not "foreclose proportionality review of sentences of imprisonment"—a point we readily concede. Petitioner

Likewise, petitioner's sentence and crimes are at least roughly comparable in their severity and seriousness to those in other cases in which the courts of appeals have rejected Eighth Amendment challenges.[7] Indeed, petitioner does not claim that any court of appeals has found an Eighth Amendment violation in the imposition of a 25-year or comparable sentence for crimes that are in any way similar to his.

Moreover, the five-year maximum sentence under 18 U.S.C. 1462 and 1465, which petitioner received on each of five counts, is equal to or less than the maximum sentence for a single count of similar conduct in at least nine States (Oklahoma, Pennsylvania, Arkansas, Florida, Massachusetts, Missouri, North Dakota, Washington,

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has never attempted to show that this case involves greater disproportionality than did *Rummel*.

[7] See, *e.g.*, *United States* v. *Fermin Castillo*, 829 F.2d 1194, 1200 (1st Cir. 1987) (nothing in the Constitution forbids the imposition of six consecutive five-year sentences for six uses of the wires in the course of a single wire fraud scheme; defendant's actual 12-year sentence did not violate Eighth Amendment and was "not * * * even particularly severe"); *Tuitt* v. *Fair*, 822 F.2d 166, 180-181 (1st Cir. 1987) (life imprisonment under recidivist statute for armed robbery), cert. denied, No. 87-5474 (Nov. 9, 1987); *United States* v. *Eggleton*, 799 F.2d 378, 384 (8th Cir. 1986) (45-year sentence for armed bank robbery); *Foots* v. *Louisiana*, 793 F.2d 610 (5th Cir. 1986) (10-year term for purse snatching); *United States* v. *Terrovona*, 785 F.2d 767, 771 (9th Cir.) (one year's imprisonment for making false statement), cert. denied, 476 U.S. 1186 (1986); *United States* v. *Hack*, 782 F.2d 862, 869 (10th Cir.) (55-year term for attempted skyjacking and conspiracy), cert. denied, 476 U.S. 1184 (1986); *United States* v. *Rhodes*, *supra* (50- and 75-year sentences without parole for operating a continuing criminal enterprise); *United States* v. *Bonnet*, 769 F.2d 68, 71 (2d Cir. 1985) (minor sentenced to two consecutive five-year terms for auto theft); *United States* v. *Ortiz*, 742 F.2d 712 (2d Cir.) (10-year term with parole eligibility after five years for drug distribution), cert. denied, 469 U.S. 1075 (1984).

and Wisconsin).[8] Congress's judgment about the severity with which obscenity should be handled, although it may be a harsher judgment than that reached by many state legislatures, is hardly unique. By contrast, in *Helm*—the only case in which this Court has ever struck down a term of imprisonment on Eighth Amendment grounds—"[i]t appear[ed] that Helm was treated more severely than he would have been in *any* other State" (*Solem* v. *Helm*, 463 U.S. at 300 (emphasis added)).

To be sure, petitioner received not one maximum sentence but five consecutive maximum sentences (as presumably would have been permitted if he had engaged in similar conduct in the States and had been charged under their law), for a total sentence of not five but 25 years. But petitioner was guilty of more than one crime; in fact, he was convicted of 11 separate offenses, for which

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[8] Okla. Stat. Ann. tit. 21, § 1021 (West Cum. Supp. 1987) (ten-year maximum for sale of obscene matter); Pa. Stat. Ann. tit. 18, § 5903(a)(2) and (h)(1) (Purdon 1983) (sale of obscene materials for the purpose of resale is a felony of the third degree); *id.* § 1103(3) (seven-year maximum for felony of the third degree); Ark. Stat. Ann. § 41-3585.2(2) (Cum. Supp. 1985) (promoting obscene materials is a class D felony); *id.* § 41-901(1)(e) (six-year maximum for class D felony); Fla. Stat. Ann. § 847.07 (West Cum. Supp. 1987) (wholesale promotion of obscene materials is a felony in the third degree); *id.* § 775.082(3)(d) (West 1976) (five-year maximum for felony in the third degree); Mass. Ann. Laws ch. 272, § 29 (Law. Co-op. Supp. 1987) (five-year maximum for sale of obscene materials); Mo. Ann. Stat. § 573.020(2) (Vernon 1979) (promoting pornography in the first degree is a class D felony); *id.* § 558.011(4) (Vernon Cum. Supp. 1987) (five-year maximum for class D felony); N.D. Cent. Code § 12.1-27.1-01(1) (1985) (sale of obscene material is a class C felony); *id.* § 12.1-32-01(4) (five-year maximum for class C felony); Wash. Rev. Code Ann. § 9.68.140 (Cum. Supp. 1987) (promoting pornography is a class C felony); *id.* § 9A.20.021(1)(c) (five-year maximum for class C felony); Wis. Stat. Ann. § 944.21(1)(a) (West 1982) (sale of obscenity is a class D felony); *id.* § 939.50 (3)(d) (five-year maximum for class D felony).

he could have been sentenced to a total of 55 years' imprisonment. In any event, as we have noted, even considered in the aggregate, petitioner's 25-year sentence is less severe than sentences that have been upheld by this Court and by the courts of appeals.

Furthermore, any Eighth Amendment issues presented by this case are of little or no continuing importance, at least as regards sentences imposed by federal courts. On November 1, 1987, the Sentencing Reform Act of 1984 went into effect. See 18 U.S.C. (Supp. IV) 3551 *et seq.*; 28 U.S.C. (Supp. III) 991-998. That statute requires trial judges to impose sentences within the range established by guidelines promulgated by the United States Sentencing Commission. See 18 U.S.C. (Supp. IV) 3553; 28 U.S.C. (Supp. III) 994(a)(1). In turn, the statute providing guidance to the Sentencing Commission in establishing sentencing guidelines states that the Commission should "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. (Supp. III) 991(b)(1)(B). Accordingly, after November 1, 1987, application of the Commission's guidelines by trial judges in imposing sentence should virtually if not entirely eliminate the incidence of sentences in the federal system that are even arguably subject to attack as being disproportionate.

3. Finally, petitioner claims (Pet. 26-30) that it was improper for the trial judge to impose consecutive sentences for the three pairs of counts involving the shipment and transportation of obscene materials to the FBI.

As explained in *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981), the question whether a court may impose multiple punishments following conviction on related criminal charges is resolved by reference to what punishments the legislative branch has authorized. See

also *United States* v. *Woodward*, 469 U.S. 105, 108 (1985); *Missouri* v. *Hunter*, 459 U.S. 359, 366-369 (1983). In the context of a repetitive series of criminal acts in furtherance of an ongoing scheme, the inquiry focuses on determining what Congress intended as the unit of prosecution. See, *e.g.*, *Bell* v. *United States*, 349 U.S. 81, 83 (1955); *United States* v. *Universal C.I.T. Corp.*, 344 U.S. 218, 221 (1952); *United States* v. *Fermin Castillo*, 829 F.2d 1194, 1199-1200 (1st Cir. 1987); *United States* v. *Villano*, 529 F.2d 1046, 1061 (10th Cir.), cert. denied, 426 U.S. 953 (1976); *United States* v. *Polizzi*, 500 F.2d 856, 897 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975).

In this regard, the gravamen of a violation of 18 U.S.C. 1465 is the "knowing[ ] transport[ation] in interstate or foreign commerce for the purpose of sale or distribution [of] *any obscene* * * * *film*" (emphasis added). Section 1462(a), for its part, prohibits the "knowing[ ] use[ ] [of] any express company or other common carrier * * * for carriage in interstate * * * commerce [of] * * * *any obscene* * * * *motion-picture film*" (emphasis added). Nothing in either statute suggests that Congress intended to make the unit of prosecution or punishment a course of conduct involving the repetitive shipment of such merchandise, rather than creating a punishable offense each time a participant in such a scheme knowingly uses a common carrier to transport for resale any obscene film. Indeed, the courts have repeatedly construed similar statutes making it a crime to use interstate transportation or communications facilities in aid of illicit activities to permit prosecution and punishment of each use as a separate offense. See *United States* v. *Fermin Castillo*, 829 F.2d at 1199-1200; *United States* v. *Brown*, 770 F.2d 768, 773 (9th Cir.), cert. denied, 474 U.S. 1036 (1985); *United States* v. *Villano*, 529 F.2d at 1061-1062; *United States* v. *Polizzi*, 500 F.2d at 897-898; see also *United States* v. *Dawson*, 790 F.2d 1565, 1568 & n.3 (11th Cir. 1986) (mail theft); *United*

States v. *Dennison*, 730 F.2d 1086, 1089 (7th Cir.) (stolen credit cards), cert. denied, 469 U.S. 916 (1984). There is no reason why this established doctrine should apply any differently in the context of the obscenity laws.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1987

[9] Petitioner's additional brief suggestion (Pet. 29) that this case involves "governmental overreaching" of the sort that might violate due process and bar conviction altogether (see *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973)) was not raised below and is meritless. The FBI's conduct—placing three orders with a ready and willing supplier of contraband who had already shipped similar materials to the same area at the request of private parties—is hardly government conduct so shocking that a civilized society cannot tolerate it.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1987—202-037/60138

Supreme Court, U.S.
FILED
DEC 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-532

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

LOUIS GUGLIELMI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER LOUIS GUGLIELMI

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EDITOR'S NOTE

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REPLY BRIEF OF PETITIONER LOUIS GUGLIELMI

In its brief in opposition to the Petition for a Writ of Certiorari, the United States concedes that the Court of Appeals for the Fourth Circuit erred in failing to conduct a proportionality review of the 25-year sentence imposed in this case. (Brief for the United States in Opposition at 11, n.4)

It follows from the government's concession that the proper course is to remand the case to the Court of Appeals for the Fourth Circuit with directions that it conduct the proportionality review which it erroneously held was foreclosed. Given the government's concession, it is wholly inappropriate for it to argue that this Court should decide the proportionality question

itself -- without full briefing of the issue -- via a decision on whether or not to grant certiorari.[1]

The issue of proportionality was extensively briefed in the Court of Appeals, but was never reached there because of the Fourth Circuit's erroneous determination that it could not consider the sentence's proportionality.[2] That Court is in a far

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[1]The government argues that this Court need not correct the Fourth Circuit's error because, according to the government, the sentence is sufficiently proportionate to satisfy the Eighth Amendment. Brief for the United States in Opposition at 11, n.4. Its reliance on Rummel v. Estelle, 445 U.S. 263 (1980), and Hutto v. Davis, 454 U.S. 370 (1982), for the proposition that Petitoner's sentence passes constitutional muster is misplaced. Rummel involved a third felony offender. Davis concerned an active drug dealer who had sold drugs to be smuggled into prison, had sold drugs to an inmate's wife who was alone with an infant child, and who had himself been convicted before. 454 U.S. at 372, n.1. In contrast, this is Petitioner's first conviction.

[2]In a grotesque twist, the government seems to blame Petitioner for the Fourth Circuit's

(footnote continued)

better position to decide the proportionality question in the first instance than is this Court and, given the extraordinary demands on this Court's resources, remand to the Court of Appeals represents an appropriate allocation of judicial resources.

Alternatively, if this case is not to be remanded to the Court of Appeals, this Court should grant certiorari, and permit full

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(footnote continued from previous page) erroneous ruling. See Brief of the United States at 11, n.4. This is surely a case of blaming the victim. It fact, it was the government, in the first line of its first argument in its brief to the Court of Appeals, who told the court that the proportionality issue had already been decided by the court in United States v. Rhodes, 779 F.2d 1019 (4th Cir. 1985), cert. denied, 476 U.S. 1182 (1986). See Brief for Appellee at 12 & n.2. In his petition for rehearing and rehearing en banc, Guglielmi argued that Rhodes did not stand for the broad proposition that no sentence of a term of years is subject to scrutiny under the Eighth Amendment, pointing out that the Rhodes Court had performed a proportionality review in upholding the sentences at issue in that case. Petition for Rehearing and Suggestion for Rehearing en banc of Defendant-Appellant Louis Guglielmi at 12 & n.7.

briefing of the proportionality question.[3] To deny certiorari would not only leave standing a sentence which no court has reviewed for its validity under the Eighth Amendment but would also leave standing a holding in the Fourth Circuit that the Court of Appeals is powerless to review for proportionality any sentence less severe than a life sentence without parole, a holding which the United States admits is inconsistent with this Court's decisions.

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[3]While the government's brief purports to analyze the 25-year sentence under the framework established by this Court in Solem v. Helm, 463 U.S. 277 (1983), its analysis does not address all the relevant factors. For example, it does not even attempt to demonstrate that the 25-year sentence is comparable to sentences imposed for obscenity crimes in other jurisdictions. Nor does the government make any serious attempt -- beyond its own ipse dixit -- to demonstrate that obscenity crimes are as or more serious than other crimes such as first degree murder, kidnapping, burglary and rape for which much lesser sentences are regularly imposed.

Finally, it must be noted that the government misleadingly recasts Petitioner's argument concerning the invalidity of the five consecutive sentences imposed as simply a claim -- divorced from the Eighth Amendment -- that imposition of consecutive sentences for separate shipments of films was improper under the obscenity statute. Notwithstanding the government's attempt to bifurcate Petitioner's argument, it is part and parcel of his Eighth Amendment claim.

Under the government's analysis concerning "the unit of prosecution," the FBI need not have stopped after placing three separate orders for films it believed were obscene. Rather, according to the government, it could have continued to order films from the Petitioner indefinitely, thereby increasing his exposure without limit, and

without offense to the Constitution.[4]

Petitioner maintains that that is not the law. See O'Neil v. Vermont, 144 U.S. 323, 337 (1892).

[4]The cases it cites -- none of which involves a course of conduct in which the government was the moving force -- surely do not support that view.

CONCLUSION

For the reasons stated above and in the Petition for a writ of certiorari, the Petition for a writ of certiorari should be granted or the case remanded to the Court of Appeals.

Respectfully submitted,

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Dated: December 10, 1987
New York, New York